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In the Supreme Court of the United States

OCTOBER TERM, 1988

BILL ARMONTROUT,
Warden, Missouri State Penitentiary,
Petitioner,

vs.

FRANK KEVIN POOL,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

I.

WHETHER, IN A PETITION FOR A WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. §2254, A CLAIM OF ERROR OCCURRING IN PRIOR FEDERAL HABEAS CORPUS PROCEEDINGS CAN SERVE AS A BASIS FOR FEDERAL HABEAS CORPUS RELIEF.

II.

WHETHER A CLAIM OF CONSPIRACY TO DENY ACCESS TO THE COURTS IS COGNIZABLE IN A PROCEEDING FOR HABEAS CORPUS RELIEF UNDER 28 U.S.C. §2254.

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OPINIONS BELOW

The order of the United States Court of Appeals for the Eighth Circuit, *en banc*, denying petitioner's petition for rehearing *en banc* (App. A1), is reported at 852 F.2d 372. The opinion of the United States Court of Appeals for the Eighth Circuit, affirming the district court's dismissal of petitioner's petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254, is reported at 852 F.2d 372 (8th Cir. 1988) and is included in the appendix to this petition (App. A2).

Respondent Frank Kevin Pool originally filed his petition for a writ of habeas corpus under 28 U.S.C. §2254 on August 22, 1986, in the United States District Court for the Eastern District of Missouri (App. A23). On March 31, 1987, the district court, William L. Hungate, J., issued its order dismissing Pool's petition (App. A14). The United States Court of Appeals for the Eighth Circuit affirmed the district court's judgment on July 26, 1988 (App. A2). Petitioner Bill Armontrout, Warden of the Missouri State Penitentiary, then filed a motion for rehearing *en banc* in the Eighth Circuit. The Eighth Circuit denied petitioner's motion on September 20, 1988 (App. A1).

JURISDICTION

The United States Court of Appeals' order denying petitioner's motion for rehearing *en banc* was issued on September 20, 1988. Pursuant to 28 U.S.C. §2101(c) and Supreme Court Rules 17 and 20, the present petition for a writ of certiorari was required to be filed within ninety days of the Court of Appeals' order. Jurisdiction of this Court is invoked under 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS CITED

1. Section 1 of the Fourteenth Amendment to the United States Constitution:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Respondent, Frank Kevin Pool, is currently incarcerated in the Missouri State Penitentiary pursuant to the sentence and judgment of a Missouri state court. In 1979, respondent pled guilty to first-degree murder and was sentenced to life imprisonment. Respondent's motion for post-conviction relief in the Missouri state courts under Missouri Supreme Court Rule 27.26 was denied, and the Missouri Court of Appeals affirmed. *Pool v. State*, 670 S.W.2d 210, 212 (Mo.App., S.D. 1984) (*per curiam*).

In June, 1981, respondent filed a federal habeas corpus petition in the United States District Court for the Eastern District of Missouri, William L. Hungate, J., alleging twelve claims for relief. In October, 1982, respondent filed another federal habeas corpus petition in the United States District Court for the Eastern District of Missouri which petition that court consolidated with respondent's previous habeas action. David Noce, United States Mag-

istrate, reviewed respondent's petition and recommended respondent's petition be denied. The district court sustained the Magistrate's Report and Recommendation on May 7, 1985.

On July 7, 1985, respondent filed a notice of appeal to the United States Court of Appeals for the Eighth Circuit, appealing the judgment of the district court. Respondent also filed an application for leave to file an untimely appeal and an application for certificate of probable cause. The district court denied respondent's applications, and the United States Court of Appeals for the Eighth Circuit affirmed the district court's denial of respondent's applications. Respondent then filed a motion to vacate the district court's judgment under Fed.R.Civ. P. 60(b), alleging that Missouri corrections officials had interfered with his ability to appeal by failing to get his mail to him. Respondent's motion was denied. This Court subsequently denied respondent's motion for a writ of certiorari.

On August 22, 1986, respondent filed another petition for a writ of habeas corpus in the United States District Court for the Eastern District of Missouri. In that petition, respondent made two claims: (1) State officials "intentionally or by gross negligence interfeared [sic] with the ability to perfect an appeal in habeas corpus and 60(b) motions" (App. A14), and (2) the attorney representing respondent at the time of his guilty plea had a conflict of interest. The district court, William L. Hungate, J., dismissed petitioner's petition without issuing an order to show cause (App. A14). The district court found that "the alleged interference of state officials with earlier habeas actions may support a civil rights action under 42 U.S.C. §1983[,] but would not merit relief under

28 U.S.C. §2254. . . ." (App. A21). The district court decided respondent's second claim had been raised and decided on its merits in the earlier habeas corpus proceeding and dismissed that claim as successive. *Id.*

On appeal, the Eighth Circuit affirmed the judgment of the district court. However, the Eighth Circuit refused to accept the rationale of the district court for its dismissal of petitioner's claim of conspiracy among state corrections officials to deny him access to the courts (App. A5). The Eighth Circuit found that:

> Pool is not seeking damages caused by interference from state officials; rather, he wants this Court to recognize that he was unfairly deprived of the opportunity to pursue fully his previous habeas appeal and[,] consequently[,] wants to be allowed to bring the claims again." *Pool, supra,* 852 F.2d at 374 (App. A5).

The Eighth Circuit swept aside the district court's conclusion that respondent's claim of conspiracy failed to state a claim on which habeas relief may be granted in the following passage:

> We agree with Pool that his claims are properly cognizable in a habeas corpus action. The Supreme Court has made clear that habeas corpus is the proper remedy for a prisoner who is challenging the very fact or length of confinement, and who is seeking an immediate or speedier release from imprisonment. *Preiser v. Rodriguez,* 411 U.S. 475, 500 (1973). The basis of this action is Pool's claim that the acts of the state prison officials in interfering with the appeal of his previous habeas action had the effect of denying or delaying Pool's release from confinement.

> Therefore, Pool's challenge goes to the very fact of his confinement, which is a proper habeas claim.

Pool, supra, 852 F.2d at 374 (App. A5). The Eighth Circuit considered respondent's second claim, the claim alleging a conflict of interest by his counsel at guilty plea, on its merits and, as well, considered a third claim raised for the first time on appeal. *Pool, supra,* 852 F.2d at 374 (App. A5). The Eighth Circuit considered those two claims on their merits pursuant to the Court's assertion that

> . . . even if Pool prevailed on his claim regarding interference by the prison officials, in order to merit habeas relief Pool would have to show that he was prejudiced by the prison officials' acts. In other words, Pool must show that his previous habeas appeal had merit and would have been successful.

Id. The Court of Appeals then found respondent's second and third claims had been raised by respondent in his first habeas petition, and must therefore, be evaluated for their merit. *Pool, supra,* 852 F.2d at 374-376 (App. A6-A11). The Court concluded these additional two claims did not have merit. *Id.*

Petitioner then filed a petition for rehearing *en banc* in which he alleged the Eighth Circuit panel had wrongly decided that a claim of defect in a habeas petitioner's prior habeas corpus proceeding could serve as a basis for habeas corpus relief under §2254. Petitioner also alleged the panel had wrongly decided that respondent's claim of conspiracy among state officials to block his habeas appeal stated a claim under the court's federal habeas corpus jurisdiction. Petitioner's petition for rehearing *en banc* was denied on September 20, 1988. From the Eighth Circuit *en banc* order, the petitioner Warden files the instant petition in this Court.

ARGUMENT

I.

Whether, in a petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254, a claim of error occurring in prior federal habeas corpus proceedings can serve as a basis for federal habeas corpus relief.

This petition presents two vital questions of federal constitutional law, which questions are irrevocably intertwined. This Court's resolution of these questions will undoubtedly have impact on the way federal courts treat petitions for a writ of habeas corpus pursuant to 28 U.S.C. §2254. Because of the gravity of the issues presented, there is a deepening conflict among the federal circuits in this country.

As the petitioner Warden will demonstrate, as to this issue, at least three circuits have held contrary to the rule adopted by the United States Court of Appeals for the Eighth Circuit. Only one circuit has held similarly to the Eighth Circuit. Given that conflict and the importance of the issues raised in this petition, this Court should intervene by its grant of certiorari and resolve these questions.[1]

The panel's position is clear on this vital issue. The panel concluded that

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1. As petitioner will demonstrate further, *infra*, this Court has already granted certiorari to the United States Court of Appeals for the Fourth Circuit to resolve a question of similar gravity. In the Fourth Circuit case, the Court has granted certiorari to consider whether death row inmates seeking post-conviction relief in Virginia state courts are entitled to the assistance of counsel. *See, Murray v. Giarratano*, No. 88-411. This petition presents a similar opportunity for this Court to resolve when, and under what circumstances, a federal habeas corpus petitioner may challenge errors in earlier federal habeas corpus proceedings.

> the basis of this action is Pool's claim that the acts of the state prison officials in interfering with the appeal of his previous habeas action had the effect of denying or delaying Pool's release from confinement . . . Pool's challenge goes to the very fact of his confinement, which is a proper habeas claim.

Pool, supra, 852 F.2d at 374 (App. A5). In so holding, the Eighth Circuit panel essentially allowed a habeas corpus petitioner to state, as a cause of action in a successive habeas corpus petition, a claim of error occurring in his prior habeas corpus proceeding. As petitioner will show, the Eighth Circuit panel ruling on this issue portends disaster for federal district courts which exercise habeas corpus jurisdiction under 28 U.S.C. §2254. Insofar as the Eighth Circuit panel holds that petitioner has a "right" to pursue federal habeas corpus litigation, that disaster looms for every federal habeas corpus court. Petitioner will demonstrate specifically why this Court should grant certiorari and stem this on-rushing tide.

In the first place, the Eighth Circuit panel's ruling that a habeas corpus petitioner may assert, in a second habeas corpus petition, a claim that there was some infirmity in the proceedings under his first habeas corpus petition, is a principle wholly unsupported in this Court's §2254 jurisprudence. Section 2254, by its own terms, only allows a habeas corpus petition by a person who claims he is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §2254(a). Thus, §2254, by its express terms, does not contemplate a situation in which a petitioner seeks relief based not on the unlawfulness of his incarceration, but rather, on the constitutional infirmities in his federal post-conviction proceedings.

Certainly, the view that there is some "right" to federal habeas corpus review of state-court conviction, the violation of which right itself gives rise to a claim for relief under §2254, is a view wholly unsupported by this Court's jurisprudence. Indeed, the Eighth Circuit panel implicitly acknowledges that there is no case law support for its approach in this case when the court cites no authority for its assertion that respondent's attack upon his earlier habeas corpus proceedings stated a claim for relief under §2254. *Pool, supra,* 852 F.2d at 374 (App. A5).

To be sure, this Court has repeatedly emphasized that post-conviction review of a state-court conviction is not a proceeding to which the full panoply of rights under the Due Process Clause applies. *See, Pennsylvania v. Finley,* ..... U.S. ....., 107 S.Ct. 1990, 1994 (1987); *Evitts v. Lucey,* 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). This Court has held that state post-conviction relief—relief which is "even further removed from the criminal trial than is discretionary direct review"—*see, Finley, supra,* 107 S.Ct. at 1994, is an avenue of relief which states have no obligation to provide. *Id.; see also, Evitts, supra,* 469 U.S. at 401. Because post-conviction relief is wholly discretionary, the court held in *Finley* that the fundamental fairness mandated by the Due Process Clause did not require that the state supply an attorney on post-conviction review. *Finley, supra,* 107 S.Ct. at 1994. Significantly, in *Finley,* this Court declined to extend the "equal protection guarantee of 'meaningful access' " to cases in post-conviction relief. *Finley, supra,* 107 S.Ct. at 1994.

This Court has refused to extend full due process protections to petitioners on collateral review of their

state-court convictions. As well, three circuits which have considered the issue of whether errors or defects in a state post-conviction proceeding entitle a petitioner to federal habeas corpus relief have held that errors in state post-conviction proceedings do not entitle a petitioner to habeas corpus relief. *See, Vail v. Procunier,* 747 F.2d 277 (5th Cir. 1984); *Kirby v. Dutton,* 794 F.2d 245, 247-248 (6th Cir. 1986); *Bryant v. State of Maryland,* 848 F.2d 492, 493 (4th Cir. 1988). Prior to *Finley, supra,* only one circuit appeared to hold to the contrary. *See, Dickerson v. Walsh,* 750 F.2d 150, 153 (1st Cir. 1984).[2]

The same analysis by which this Court has determined errors in state post-conviction proceedings do not give rise to a cause of action under §2254, should apply with equal or greater force to claims of infirmities in federal habeas corpus relief. For by the time most habeas corpus petitioners will have reached federal court, the constitutionality of their convictions will already have been tested twice in state court: once on direct appeal and once in state post-conviction proceedings.[3] There is even less reason for this Court to press down upon the

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2. This Court has recently granted certiorari to consider whether Virginia prison inmates are entitled to the assistance of counsel in state post-conviction proceedings. *Giarratano v. Murray,* 847 F.2d 1118 (4th Cir.), *cert. granted,* 109 S.Ct. 303 (1988). This Court has before it, in *Murray,* a case raising the issue of whether the right of "equal access to the courts" extends to state post-conviction proceedings. The instant case presents a companion question to the *Murray* question—the question of whether, and how far the right of "equal access to the courts" extends to federal habeas corpus proceedings. This case should be taken up by this Court in tandem with *Murray, supra.*

3. Respondent presents a stark example of this principle. Respondent has litigated the constitutionality of his conviction over a period of years in both state and federal courts. *See, Pool v. Wyrick,* 703 F.2d 1064 (8th Cir. 1983), for a discussion of the history of petitioner's state- and federal-court litigation.

federal district courts the full impact of the guarantees of the Due Process Clause when the conviction under scrutiny in the commonplace federal habeas corpus case has already been reviewed twice in state court. There is even less necessity in this context for another crushing layer of due process requirements to be placed atop the concerns already burdening the federal habeas corpus court.

Beyond this sound policy reason for this Court to grant certiorari and modify the judgment of the Eighth Circuit panel, there is another jurisprudential reason for this Court to act. Were the Eighth Circuit panel's holding to be allowed to stand, the potential consequences for the federal habeas corpus court are devastating. There is no logical end to the due process protections which the panel's rationale could force upon the federal district court in its review of a petition for a writ of habeas corpus under §2254. The rubric of "access to the courts" served as the foundation for the Eighth Circuit's ruling. See, *Pool*, *supra*, 852 F.2d at 374 (App. A5). The federal habeas corpus court could be transformed into a maddening procedural maze. Under the "access to the courts" rationale, a federal habeas corpus court could no longer be free to rule summarily on meritless petitions without the appointment of counsel. Under the "access" logic, a federal habeas corpus court could not constitutionally deny access to a prisoner who had failed to exhaust state remedies pursuant to 28 U.S.C. §2254(b). Under the "access" rationale, a federal habeas corpus court could well be subjected to prolix petitions since the court would be hamstrung in its efforts to curtail the size of each petition to a reasonable length. As the Court can readily see, were the Eighth Circuit's panel ruling to be made permanent by this Court's refusal

to grant certiorari, there is no conceivable end-point to the succession of thorny procedural requirements which this "equal access" logic presses down upon the federal district court in its consideration of petitions for writs of habeas corpus under §2254.

Finally, this Court should recognize that the Eighth Circuit's panel ruling decisively defeats the principle of finality. This Court recognized that finality is an important concept in the context of a federal habeas corpus proceeding when it adopted Rule 9 of the rules governing §2254 cases. Rule 9 prohibits the filing of delayed petitions, as well as second or successive petitions. In the Advisory Committee Notes following Rule 9, the Advisory Committee cited *McMann v. Richardson*, 397 U.S. 759, 773, 774, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970), which makes clear this Court's "dislike of collateral attacks on sentences long since imposed which [attacks] disrupt the state's interest in [the] finality of convictions which were constitutionally valid when obtained." Advisory Committee Notes foll. Rule 9. This interest in finality, which this Court emphasized in *McMann*, *supra*, is destroyed altogether by the Eighth Circuit's panel's ruling. The Eighth Circuit panel opinion opens the door for successive federal collateral attacks, each attack alleging the attack before it was infirm in some way. On a habeas corpus petitioner's "nth" petition, the petitioner can allege that there was some infirmity in the petition just prior to the "nth" petition. Each successive petition, as this Court can see from its review of respondent's state- and federal-court litigation, takes the reviewing court further and further away from the original state-court conviction. The focus of the federal habeas corpus court becomes not the constitutional guarantees

inherent in the petitioner's trial, but rather, the nuances of federal habeas corpus procedure.

A state can entertain no legitimate hope in the finality of its criminal convictions when petitioners are allowed to file petition after petition, with each new petition alleging some constitutional flaw in the federal habeas corpus action just preceding it. This Court should take the opportunity of its grant of certiorari to prevent this onerous result.

II.

Whether a claim of conspiracy to deny to the courts is cognizable in a proceeding for habeas corpus relief under 28 U.S.C. §2254.

The district court in respondent's case dismissed respondent's petition. The district court specifically found that "the alleged interference of state officials with earlier habeas actions [by respondent] may support a civil rights action under 42 U.S.C. §1983, but would not merit relief under 28 U.S.C. §2254 . . ." (District Court Order of March 31, 1987) (App. A21). The Eighth Circuit panel, although it affirmed the district court, swept aside the district court's determination that this particular claim did not state a cause of action under 28 U.S.C. §2254. The panel held that

> the basis of this action is Pool's claim that the acts of the state prison officials in interfering with the appeal of his previous habeas action had the effect of denying or delaying Pool's release from confinement. Therefore, Pool's challenge goes to the very fact of his confinement, which is a proper habeas claim.

Pool, supra, 852 F.2d at 374 (App. A5). In so doing, the panel ignored the prevailing trend among the circuits, and as well, the panel appears to open wide a new and forbidden chasm in federal habeas corpus jurisdiction. Assuming the court is untroubled by the first question presented in the instant petition, this question nonetheless merits this Court's grant of certiorari. This case presents the opportunity for this Court to resolve the question left often by this Court's opinion in *Bell v. Wolfish,* 441 U.S. 520, 526 n. 6, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979), and in *Preiser v. Rodriguez,* 411 U.S. 475, 499-500, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973). This Court should decide that the district court was correct in its conclusion that Respondent Pool's challenge to the alleged actions of state officials in holding up the notice of appeal from Pool's prior habeas action did not state a claim for relief under 28 U.S.C. §2254.

To be sure, the panel attempted to shape respondent's claim such that it fit the rule in *Preiser v. Rodriguez, supra.* In *Preiser,* this Court held that

> when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus.

Preiser, supra, 411 U.S. at 500. As the above excerpt discloses, the Eighth Circuit attempted to bring respondent's claim within the rule in *Preiser* by finding that "the acts of the state prison officials in interfering with the appeal of his previous habeas action had the effect of denying or delaying Pool's release from confinement." *Pool, supra,* 852 F.2d at 374 (App. A5). As this Court

can readily see, in that one sentence, the panel takes a stunning leap of logic. The panel essentially equates the appeal of a habeas corpus petition, which was denied on its merits, with a release from confinement. As this Court should note, the Eighth Circuit panel then went on to find that the claims respondent had raised in that earlier habeas corpus petition were found to be meritless. Thus, when boiled to its essence, the panel held that when a habeas corpus petitioner is prevented from pursuing a meritless appeal, he is effectively delayed from release from confinement. The panel's logic simply cannot withstand scrutiny. Accordingly, this Court should wipe away the panel's attempt to massage petitioner's claim into a claim that is cognizable under 28 U.S.C. §2254. Rather, this Court should focus on the question of whether petitioner's attack, which is, at its heart, an attack on the conditions of his confinement, is an attack cognizable under 28 U.S.C. §2254.

In the first place, this Court should analyze respondent's claim of conspiracy to deny his access to the courts in terms of the relief respondent expected when he filed the claim. In *Preiser, supra*, this Court focused on the relief the state prisoner seeks in determining whether a claim was cognizable under 28 U.S.C. §2254. The court noted that when a state prisoner seeks the relief of a "determination that he is entitled to immediate release or a speedier release from the imprisonment," the petitioner must bring his claims for relief in a petition for a writ of habeas corpus. *Preiser, supra*, 411 U.S. at 500. When the rule in *Preiser* is laid alongside the claim respondent made in the case at bar, the folly of the Eighth Circuit's ruling becomes apparent. The essence of the Eighth Circuit's ruling is that a claim of conspiracy to deny access to the courts by the con-

spiracy of state officials to deny respondent's notice of appeal in a prior habeas corpus action, goes to the "very fact of [respondent's] confinement." *Pool, supra,* 852 F.2d at 374 (App. A5). However, the court acknowledges, in the very same passage, that the relief respondent sought for his claim of conspiracy was not a release from confinement, but rather, for ". . . this Court to recognize that he was unfairly deprived of the opportunity to pursue fully his previous habeas appeal and[,] consequently[,] [respondent] wants to be allowed to bring the claims again." *Id.* Of course, respondent could not have seriously contended that he expected to be released from confinement based on the claim that state officials conspired to hold up his notice of appeal from his prior habeas corpus action.

The essence of the panel's ruling is that the relief sought by respondent in this case was for the court to reinstate his earlier habeas corpus action and to consider his earlier claims on their merits. *Id.* Thus stated, the relief respondent sought in his successive habeas corpus petition in no way affected the fact or length of his confinement. Thus, the claim that state officials conspired to deny respondent access to the courts does not resemble the kind of claim cognizable under §2254. For this Court made clear in *Preiser v. Rodriguez,* that claims challenging the fact or duration of confinement make up "the heart of habeas corpus." *Preiser, supra,* 411 U.S. at 498.

This Court should find that a claim, like the claim raised by respondent in the case at bar, which claim does not seek as its end respondent's release from confinement and which does not go to the fact or length of respondent's confinement, does not state a cause of

action under 28 U.S.C. §2254. This Court should recognize that there is the necessity for a "bright line" separating the writ of habeas corpus under 28 U.S.C. §2254 from the civil rights action under 42 U.S.C. §1983. Section 2254 should be available to litigate the constitutionality of state-court convictions, as well as other state determinations affecting the duration of confinement. 42 U.S.C. §1983, on the other hand, should be available to challenge the conditions of confinement.

When viewed in the context of the present case, there is much to commend the "bright line" approach to this Court. A suit alleging civil rights violations pursuant to 42 U.S.C. §1983 would, in the normal case, present a factual controversy which would necessarily be resolved by a trier-of-fact. On the other hand, the routine habeas corpus case is a case litigating the constitutionality of an earlier state-court decision or determination. Unless there is a factual controversy which went unresolved in the earlier state proceeding, there is no need in the routine federal habeas corpus case for protracted trial-like proceedings. Were this Court to allow the Eighth Circuit ruling to stand, in every federal habeas corpus case, the federal courts could expect some attack on the conditions of the petitioner's confinement. Such an attack, it can safely be predicted, would raise a factual controversy necessitating an evidentiary hearing.[4] Under Rule 8 of the Rules foll. §2254, "if an evidentiary hearing is required[,] the judge must

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4. In fact, the Eighth Circuit panel in this case acknowledged that "[b]ecause no evidence was presented to the district court on Pool's claim regarding the interference by state prison officials with his previous habeas appeal, an evidentiary hearing would be necessary to determine the validity of Pool's allegations." *Pool, supra*, 852 F.2d at 374 (App. A5).

appoint counsel for a petitioner who qualified for appointment under the Criminal Justice Act." Advisory Committee Note foll. Rule 8. Thus, were this Court to allow petitioners to mix fact-based claims challenging current prison conditions with claims litigating the constitutionality of their convictions, this Court can well imagine the flood of claims which might result, each claim's requiring the appointment of an attorney to represent the indigent petitioner and each claim's requiring precious judicial time to determine its factual merits. This Court should act by its grant of certiorari to prevent the mixing of "fact or duration" claims and "condition" claims in a single petition for a writ of habeas corpus.

There is a second juridical reason why this Court should refuse to allow challenges to the conditions of confinement to be cognizable in a petition for a writ of habeas corpus under §2254. As the *Preiser* Court noted, the federal habeas corpus court in a habeas case has jurisdiction to fashion relief amounting to an immediate or speedier release from confinement. *Preiser, supra.* In the instant case, however, the court fashioned different relief. The court essentially allowed petitioner to proceed with an untimely appeal. Were this Court to refuse to overturn the Eighth Circuit panel's ruling, the federal habeas corpus court would find itself confronted with petitions requesting all sizes and shapes of equitable relief. One petition could seek immediate release from confinement. Still another petition may request the reinstatement of a long-dormant habeas corpus petition. Still another petition may request that petitioner be moved from one cell to another or from one institution to another or from one state to another. Yet another petition may seek the court to alter the dimensions of petitioner's cell or the color of the paint on the walls of

petitioner's cell. The net effect of the panel's ruling is that the federal habeas corpus court is plunged into a confusing morass in which each new petition challenges some condition of confinement.

While it is desirable for prisoners to have a forum for challenging the conditions of confinement, that forum should be a civil rights suit under 42 U.S.C. §1983, in which the prisoner seeks money damages, limited injunction relief, or a declaratory judgment. It is manifestly undesirable for the federal habeas corpus court, which court should be allowed to confine itself to review of the fact or duration of a petitioner's incarceration, to be plunged into the task of administering the conditions of that confinement as well. So long as 42 U.S.C. §1983 may be used as a vehicle for challenging the conditions of prison confinement, there is no need for the federal courts to administer overlapping remedies in prison condition cases. Whereas habeas corpus originally may have been made available for challenges to the conditions of prison life because there was no other remedy for those claims, this Court acknowledged in *Preiser, supra*, the view that since the scope of §1983 relief was dramatically expanded to include prison condition claims, *see, Cooper v. Pate*, 378 U.S. 546, 84 S.Ct. 1733, 12 L.Ed. 2d 1030 (1964), there was corresponding necessity for the availability of a remedy under §2254. This Court should acknowledge that insofar as respondent could have maintained his conspiracy claim in a civil suit under 42 U.S.C. §1983, there is no need for the habeas corpus court to have considered respondent's conspiracy claim as sounding in habeas corpus under §2254. This Court should preserve the "bright line" distinction petitioner has suggested, *supra*.

There is one additional policy reason which makes worthwhile this Court's exercise of its certiorari. In the instant case, respondent filed one habeas corpus petition which was denied on its merits. Respondent then failed to timely appeal the adverse judgment. *Pool, supra,* 852 F.2d at 373 (App. A3-A5). On respondent's successive habeas corpus petition, the Eighth Circuit panel essentially decided the merits of respondent's earlier untimely appeal. Respondent was therefore successful in evading the federal rules regarding the time limits of a notice of appeal simply by alleging a conspiracy existed to deprive him of that appeal and by including that allegation in a successive habeas corpus petition. Whatever the factual merits of petitioner's claim, that is a process federal courts of appeal should not encourage.

As Justice Scalia noted in his dissent in this Court's recent decision of *Houston v. Lack,* ..... U.S. ....., 108 S.Ct. 2379 (1988), at 2388: ". . . there is no warrant for equitable tolling of filing deadlines in the civil context of [a] habeas corpus proceeding . . . ." The approach used by the Court of Appeals in the instant case also evades this Court's time-honored rule that "the timely filing of a notice of appeal is 'mandatory and jurisdictional.'" *Houston v. Lack, supra,* 108 S.Ct. at 2388 (Scalia, J., dissenting, *citing, Briggs v. Provident Consumer Discount Co.,* 459 U.S. 56, 58, 61, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982)). The Eighth Circuit panel allows, through the backdoor, an appeal which the Federal Rules of Appellate Procedure, *see,* Fed.R.App.P. 4, does not allow through the front door. This Court should take the occasion of its grant of certiorari to specifically condemn the Eighth Circuit panel's approach in this case. This presents an additional reason for the granting of certiorari in this case.

For all the above reasons, this Court should grant certiorari on this issue and modify the judgment of the court of appeals.

CONCLUSION

Petitioner respectfully requests that this petition for a writ of certiorari be granted and that the court of appeals' judgment be modified. In the alternative, petitioner requests, this Court remand this case to the Court of Appeals for reconsideration in light of this Court's opinion to be forthcoming in *Murray v. Giarratano, supra.*

Respectfully submitted,

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APPENDIX

(Dated September 20, 1988)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-1464-EM

Frank Kevin Pool,
Appellant,

vs.

Bill Armontrout, Warden,
Appellee.

Appeal from the United States District Court for the Eastern District of Missouri

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Petitions for rehearing en banc filed by appellant and appellee have been considered by the Court and are denied.

Petitions for rehearing by the panel are also denied.

September 20, 1988

Order Entered at the Direction of the Court:

/s/ Robert D. St. Vrain
Clerk, United States Court of Appeals,
Eighth Circuit

(Filed July 26, 1988)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-1464

Frank Kevin Pool,
Appellant,

v.

Bill Armontrout, Warden,
Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: January 13, 1988
Filed: July 26, 1988

Before HEANEY, Circuit Judge, ROSS, Senior Circuit Judge, and WOLLMAN, Circuit Judge.

ROSS, Senior Circuit Judge.

Frank Kevin Pool appeals from the district court's[1] dismissal of his habeas corpus petition. For the reasons set forth below, we affirm.

I.

In 1979, Pool pleaded guilty to first degree murder and was sentenced to life imprisonment. Pool was 15

1. The Honorable William L. Hungate, United States District Judge for the Eastern District of Missouri.

years old at the time of the murder. In March 1980, Pool filed a motion for post-conviction relief in the Missouri state circuit court under Mo. R. Crim. P. 27.26. After an evidentiary hearing, Pool's Rule 27.26 motion ultimately was denied, and the Missouri Court of Appeals affirmed. *Pool v. State*, 670 S.W.2d 210, 212 (Mo. Ct. App. 1984) (per curiam).

In June 1981, Pool filed a federal habeas corpus claim, alleging the eleven grounds for relief which he had set forth in his state motion for post-conviction relief, including claims that he had received ineffective assistance of counsel at the time of his guilty plea because his counsel had failed to adequately investigate his mental state and because his counsel had a conflict of interest. Pool further alleged that he was denied access to the courts for the purposes of prosecuting his state post-conviction relief proceedings. In October 1982, Pool filed another federal habeas corpus petition, which the district court consolidated with Pool's previous habeas action. The consolidated actions were referred to United States Magistrate David Noce for review and recommended disposition. After considering Pool's twelve asserted grounds for relief, Magistrate Noce concluded that Pool had received a full and fair evidentiary hearing on his claims in state court. The magistrate agreed with the state court that Pool's claims were without merit, and therefore recommended that Pool's petitions be denied without further proceedings. The district court sustained the Magistrate's Report and Recommendation on May 7, 1985.

On July 7, 1985, Pool appealed the district court's decision. He also filed an application for leave to file an untimely appeal and an application for certificate of

probable cause. The district court denied Pool's applications, and this court affirmed. Pool then filed a motion to vacate the district court's judgment under Fed. R. Civ. P. 60(b), arguing that the state prison officials had interfered with his ability to appeal by failing to get his mail to him. This request was also denied. The United States Supreme Court subsequently denied Pool's petition for certiorari.

Pool then brought this habeas corpus action, alleging two claims: 1) state officials interfered with his ability to perfect an appeal in his habeas corpus and Rule 60(b) claims; and 2) the attorney representing him at the time of his guilty plea had a conflict of interest. The district court dismissed Pool's petition, determining that the conflict of interest claim had been raised and decided on its merits in Pool's previous habeas actions. The district court further determined that while the claim regarding interference by state officials with Pool's access to the courts might support a civil rights action under 42 U.S.C. § 1983, it would not merit relief as a habeas corpus action under 28 U.S.C. § 2254.

Pool brings this appeal, alleging that the district court erred in dismissing his petition. In addition, Pool asserts a third claim—that his counsel was ineffective for failing to seek an independent psychiatric examination for him prior to his guilty plea.

II.

Pool's first claim on appeal is that state officials interfered with his ability to appeal the denials of his previous habeas corpus action and his Rule 60(b) motion. Specifically, Pool alleges that the state prison officials

failed to inform him during the appeal period of his habeas action that his claims had been denied. He further alleges that the prison officials at the mail center held his outgoing notice of appeal of the denial of his Rule 60(b) motion until the time for appeal had passed. The district court determined that these were not proper habeas corpus claims, but rather were § 1983 civil rights claims.

Pool argues that the district court misconstrued the relief he seeks. Pool is not seeking damages caused by interference from state officials; rather, he wants this court to recognize that he was unfairly deprived of the opportunity to pursue fully his previous habeas appeal and consequently wants to be allowed to bring the claims again.

We agree with Pool that his claims are properly cognizable in a habeas corpus action. The Supreme Court has made clear that habeas corpus is the proper remedy for a prisoner who is challenging the very fact or length of confinement, and who is seeking an immediate or speedier release from imprisonment. *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973). The basis of this action is Pool's claim that the acts of the state prison officials in interfering with the appeal of his previous habeas action had the effect of denying or delaying Pool's release from confinement. Therefore, Pool's challenge goes to the very fact of his confinement, which is a proper habeas claim.

Because no evidence was presented to the district court on Pool's claim regarding the interference by state prison officials with his previous habeas appeal, an evidentiary hearing would be necessary to determine the validity of Pool's allegations. However, we note that

even if Pool prevailed on his claim regarding interference by the prison officials, in order to merit habeas relief Pool would have to show that he was prejudiced by the prison officials' acts. In other words, Pool must show that his previous habeas appeal had merit and would have been successful. The parties agree that this court has before it now in the record all the evidence relevant for determining whether Pool's previous habeas appeal had merit. We therefore carefully consider this record, which includes the Magistrate's Report and Recommendation from Pool's previous habeas action and the transcript and state court findings from the hearing on Pool's Rule 27.26 motion, to determine whether Pool would have been entitled to relief on his previous habeas appeal. If Pool would not have been entitled to such relief, there is no need for an evidentiary hearing on his claim regarding the interference by state prison officials.

III.

In Pool's previous habeas action, he asserted twelve grounds for relief. In this action Pool argues only two of these grounds, both of which relate to the alleged ineffective assistance of his counsel at the time of his guilty plea. Pool's first argument is that his counsel was ineffective because she had a conflict of interest. Pool's second argument is that his counsel was ineffective for failing to thoroughly investigate his mental state for purposes of pursuing the defense of not guilty by reason of mental defect. Although the state court and Magistrate Noce both considered and rejected these claims, Pool argues that their findings were erroneous. Pool contends that he did not get a full and fair evidentiary hearing before the state court, and that therefore the

magistrate should have held an evidentiary hearing before recommending that Pool's habeas petition be dismissed.

With regard to his conflict of interest claim, Pool asserts that the conflict arose when Pool's attorney, the public defender, hired into her office Kerry Kobaldt to be an assistant public defender. Kobaldt had been the prosecutor who had originally filed the first degree murder charges against Pool, and who had then refiled them as capital murder charges. During the pendency of the proceedings against Pool, Kobaldt had lost his bid for re-election as prosecutor and was hired into the public defender's office.

In order to establish a violation of his sixth amendment right to effective assistant of counsel, Pool must show that his counsel's performance was deficient and that Pool's defense thereby was prejudiced. *Strickland v. Washington,* 466 U.S. 668, 687 (1984). A counsel's representation is deficient if it falls "below an objective standard of reasonableness." *Id.* at 687-88. *See also Nance v. Benson,* 794 F.2d 1325, 1327 (8th Cir. 1986). "Judicial scrutiny of counsel's performance must be highly deferential." *Strickland, supra,* 466 U.S. at 689. Prejudice is presumed where a petitioner establishes that his counsel had an actual conflict of interest which adversely affected the counsel's performance. *Id.* at 692.

Pool does not argue that his counsel had an actual conflict of interest, nor is there any evidence of such in the record. As the magistrate in Pool's previous habeas proceeding found, Pool's attorney did not discuss Pool's case with Kobaldt after Kobaldt joined the public defender's office, nor did Kobaldt work on Pool's case after

leaving the prosecutor's office. There is no evidence in the record that Kobaldt in any way influenced Pool's attorney in her representation of Pool after Kobaldt joined the public defender's office.

Absent an actual conflict of interest, Pool must establish that his counsel was ineffective under the two-pronged *Strickland* test. *See Wright v. Minnesota,* 833 F.2d 746, 749 (8th Cir. 1987) (per curiam), *cert. denied,* 108 S.Ct. 1481 (1988). We do not find that Pool's counsel's conduct in representing Pool after Kobaldt was hired as an assistant public defender fell below an objective standard of reasonableness. Therefore, we do not reach the question of prejudice. Pool's assertion that the mere appearance of impropriety is sufficient to establish ineffective assistance of counsel is without legal basis.

IV.

Pool's second contention presents a more difficult question. Pool argues that his counsel was ineffective for failing to thoroughly investigate his mental state in order to pursue the defense of not guilty by reason of mental defect. As noted previously, to establish a claim of ineffective assistance of counsel, Pool must establish that his attorney's representation was deficient and that Pool thereby suffered prejudice. *Strickland, supra,* 466 U.S. at 687. Therefore, the question presented here is whether, under the circumstances, Pool's counsel's conduct in failing to seek an independent psychiatric examination fell below an objective standard of reasonableness.

The record reveals that in addition to a court-ordered psychiatric examination, Pool was subject to two additional mental examinations prior to his guilty plea. The

first was performed in February 1978, in order to assist the juvenile court in determining whether Pool should be certified to be tried as an adult. The clinical psychologist evaluating Pool recommended that Pool be so certified, finding that while Pool had an antisocial personality disorder, he was "competent to cooperate in his defense and free of mental disease or defect that would prevent him from being responsible for his behavior."

In August 1978, Pool was admitted to the Fulton State Hospital for the court-ordered psychiatric examination. The examination had been sought by Pool's attorney's predecessor in the public defender's office, who had filed a notice that Pool would rely on the defense of mental defect. Prior to the court-ordered examination, a preliminary psychological examination was performed on Pool at the hospital on August 3-4, 1978. The examining psychologist found that Pool had "good reality contact." He stated that Pool had attempted to exaggerate during the testing in hopes of being viewed as mentally ill.

Finally, Pool was examined pursuant to the court order by Dr. Sadashiv Parwatikar at the Fulton State Hospital on August 20, 1978. Although noting that Pool engaged in "inappropriate laughter," Dr. Parwatikar found that Pool did not have a mental disease or defect as defined under Missouri law, he was capable of assisting in his own defense, and he knew the nature and wrongfulness of his acts and was capable of conforming them to the requirements of the law.

Pool now argues that Dr. Parwatikar's opinion is unreliable because at the time of the examination Pool was on a drug, Thorazine, which affected his mental

state. At the state court Rule 27.26 hearing, Dr. Parwatikar stated that at the time of Pool's examination, he did not know whether Pool had been administered Thorazine. However, he testified that even if Pool had been given Thorazine, it would not have affected his evaluation of Pool. Dr. Parwatikar testified that Thorazine is a tranquilizer that is used to sedate, and that it may slow down the thought processes, but does not otherwise affect them.

Pool raised this ineffective assistance of counsel claim before the state court in his Rule 27.26 motion, arguing that his attorney should have investigated his mental state more thoroughly. The court rejected his claim, largely discussing the testimony of Dr. Parwatikar. The state court also noted that there was no evidence that Pool was incompetent at the time he entered his guilty plea.

The magistrate also rejected this claim in Pool's previous habeas action. The magistrate discussed the testimony of Dr. Parwatikar and noted that Pool testified at the Rule 27.26 hearing that he and his attorney had discussed the possible defense of mental defect. The magistrate additionally pointed to Pool's attorney's testimony at the Rule 27.26 hearing that Pool never exhibited to her any reason to doubt his competency. Finally, like the state court, the magistrate found that there was no indication that Pool was incompetent when he made his guilty plea.

After carefully reviewing the record in this case, we find the question of whether Pool's attorney rendered ineffective assistance of counsel for failing to seek an independent psychiatric examination to be a close one.

We note that Pool was only 15 years old at the time of the murder, and that he only had a seventh grade education. Pool had exhibited a history of violent behavior and had a below average intelligence. In 1975, Pool had spent six months in the Fulton State Hospital. We think it is important to note also that, considering the overwhelming evidence against Pool, his best defense had he gone to trial would have been mental defect.

On the other hand, we note that Pool underwent mental examinations by two psychologists and a psychiatrist, all of whom found him to be free of mental defect. Although Pool claims that Dr. Parwatikar's examination is unreliable because he was on Thorazine, Dr. Parwatikar said his opinion would have remained unchanged even if Pool had been given Thorazine. Further, Pool failed to present any evidence that he was under the effect of Thorazine on the day of the examination. The hospital reports which are in the record indicate Pool was given Thorazine only on August 15 and 16, 1978, while the examination by Dr. Parwatikar was on August 20, 1978.

We realize that the three mental examinations of Pool were all performed by state-related doctors. However, there is no evidence in the record that a fourth examination, even if done by an independent examiner, would have resulted in a different opinion as to Pool's mental state. There was no evidence presented that the three previous reports were defective. Consequently, we find that Pool's counsel's conduct in representing him did not fall below an objective standard of reasonableness when, after three doctors found Pool free from mental defect, she failed to seek a fourth, independent psychiatric examination for Pool.

Pool also fails to prove the second requirement of the *Strickland* test, namely, that even if his counsel's performance was deficient, he was prejudiced by such deficiency. *Strickland, supra,* 466 U.S. at 687. In order to satisfy this requirement, Pool must show "that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart,* 474 U.S. 52, 59 (1985) (footnote omitted). Pool has not shown that had his attorney sought an independent examination, he would have insisted on going to trial. As previously noted, Pool has not shown that an additional psychiatric examination probably would have produced an opinion different than the opinions reached in the three previous examinations. Even if the additional examination had produced an opinion that Pool had a mental defect, Pool has not shown that he probably could have been successful with a defense of mental defect in light of the three other examinations. *See id.* Therefore, we find that Pool has not shown either that his counsel's performance was deficient, or that he was prejudiced by any such deficient performance with regard to the investigation of his mental state.

Although he does not argue them before this court, Pool presented several other claims in his previous habeas action. We have carefully reviewed the record, including the Magistrate's Report and Recommendation, and find these claims to be without merit.

We conclude that Pool would not have been successful in the appeal of his previous habeas corpus action. Our decision obviates the need to remand this case to the district court for an evidentiary hearing regarding

Pool's claim of interference with his appeal rights by state prison officials. Consequently, the decision of the district court to dismiss Pool's habeas corpus petition is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

(Filed March 31, 1987)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 86-1711C(3)

FRANK KEVIN POOL,
Petitioner,

v.

BILL ARMONTROUT, Warden,
Respondent.

ORDER

This matter is before the Court to determine whether process and summons shall issue.

Pursuant to 28 U.S.C. § 2254, Frank Kevin Pool filed a petition for habeas corpus. In particular, petitioner stated the following claims:

> [A] STATE OFFICIALS INTENTIONALLY OR BY GROSS NEGLIGENCE INTERFEARED [sic] WITH THE ABILITY TO PERFECT AN APPEAL IN HABEAS CORPUS AND 60B MOTIONS.
>
> THE STATE OFFICIALS WITHHELD FROM THE PETITIONER THAT AN ORDER WAS ISSUED DENYING HABEAS CORPUS SO THAT A TIMELY APPEAL COULD BE FILED. WHEN THE PETITIONER TRIED TO APPEAL UNTIMELY HE COULD NOT. THE OFFICIALS AT MISSOURI EASTERN CORRECTIONAL CENTER HAD PETI-

TIONER LOCKED DOWN AND DURING THAT TIME WITHHELD FROM THE PETITIONER THE FACT THAT THE HABEAS CORPUS HAD BEEN DENIED UNTIL SUCH TIME AS THE APPEAL TIME WAS UP. FURTHER, THE CLERK FAILED ALSO TO GET A COPY OF THE ORDER TO PETITIONER DENYING HABEAS CORPUS. THE CLERK HAD THE ADDRESS AND PUT THE IMPROPER ADDRESS ON IT, BUT THE STATE STILL SHOULD HAVE GOT [sic] THE ORDER TO PETITIONER. PETITIONER WILL TESTIFY TO THIS. ALSO, PETITIONER FILED A 60B MOTION AND WHEN IT WAS DENIED THE PETITIONER FILED A TIMELY APPEAL, AND THE APPEAL WAS HANDED TO A CORRECTIONAL COUNSELOR TO MAIL AND IT WAS HELD UP UNTIL THE TIME RAN OUT. SEE ATTACHED. [and]

[B] PETITIONER HAD COUNSEL REPRESENTING HIM THAT HAD CONFLICTING INTEREST.

THE PROSECUTOR THAT FILED THE CHARGES, THAT MADE DEALS WITH THE CODEFENDANT, AND WHO DISMISSED THE FIRST DEGREE MURDER CHARGES AND RAISED THEM TO CAPITAL MURDER WAS HIRED BY PETITIONER'S LAWYER BEFORE THE PLEA. THE STATE REPRESENTED AT THE STATE HEARING THAT THE EX-PROSECUTOR DID NOT HAVE NOTHING TO DO WITH THE CASE. THE EVIDENCE SHOWED THAT HE WAS WORKING FOR PETITIONER'S LAWYER. PHILLIP ROYAL TESTIFIED THAT THE LAWYER, EX-PROSECUTOR

DISCUSSED PETITIONER'S CASE SEVERAL TIMES WITH HIM. PETITIONER TRIED TO APPEAL HIS HABEAS CORPUS AND HIS 60B MOTION AND THEY WAS [sic] OBSTRUCTED. IF AN APPEAL WOULD HAVE BEEN GRANTED, PETITIONER WOULD HAVE RELIEF ON BLAIR V. ARMONTROUT, 626 F.SUPP. 512 (WDMO. 1985) AND US V. KITCHEN cited THEREIN.

Attached to the petition is an affidavit of Melvin Leroy Tyler stating:

I, MELVIN LEROY TYLER, after first being duly sworn, depose, and swears [sic] that I have aided and assisted FRANK KEVIN POOL in the prosecution of his habeas corpus action, and that each time that orders were entered timely responses would be filed. I personally handed the latest notice of appeal in the 60B motion to a counselor in a timely manner, and the counsel assured me that he would taken [sic] the notice of appeal to the mailroom at the prison. I then learned by an order dated MAY 9, 1986 that the appeal was not mailed when I gave the appeal notice to the official. Likewise, when I filed the petition for writ of habeas corpus for inmate Pool, he was moved to another Institution and he mailed me his legal papers to MSP to be dealth [sic] with. Pool sent me his denial of habeas corpus by JUDGE HUNGATE and it was completely out of time, the appeal could not be revived, and I tried to take the case to the US COURT OF APPEALS to get an untimely appeal, and to the US Supreme Court and the Courts would not grant an untimely appeal.

I blame the failure to get the court papers to the court and to Pool on the failure of the Officials to promptly take the documents and mail them, and for the clerk mismailing Judge Hungates [sic] order denying the writ to the wrong address. However, I feel that even though the clerk mismailed it they could have got [sic] the order to Pool in time.

I am familiar with the procedures used by the MISSOURI DEPARTMENT OF CORRECTIONS and the ATTORNEY GENERALS [sic] OFFICE. I did everything humanly possible to save the appeal of petitioner POOL.

POOL does not have any legal education and must rely on the services of the Law Center.

I am aware of the decision in *US EX REL. COOK V. DOWD*, 71 S.Ct. 262, 340 U.S. 206 and believe that the case applies herein wherein the prison authorities have obstructed the ability of the affiant to file a timely appeal. I state this because of the facts and person [sic] knowledge.

Rule 4 of the rules governing cases brought under 28 U.S.C. § 2254 provides in relevant part that:

> [t]he petition shall be examined promptly by the judge to whom it is assigned. If it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the petitioner to be notified. Otherwise the judge shall order the respondent to file an answer or other pleading within the period of time fixed by the court or to

take such other action as the judge deems appropriate.

A petition may be summarily dismissed, even without addressing the exhaustion requirement, when it is obvious that the petition lacks merit. *Gutierrez v. Griggs,* 695 F.2d 1195, 1198 (9th Cir. 1983). A petition may also be properly dismissed when the issues have been determined adversely to petitioner in other habeas proceedings. *Moore v. Hill,* 487 F.2d 221, 222 (5th Cir. 1973) (per curiam).

The order with which state officials allegedly interfered was an order entered in consolidated habeas corpus actions previously filed by petitioner, habeas corpus actions in which petitioner asserted the conflict of interest issue he again seeks to raise in his present petition.

In 1981, petitioner filed an extensive petition for relief under 28 U.S.C. § 2254 which alleged in relevant part:

> Movant was denied effective assistance of counsel in violation of the 6th and 14th Amendments to the U. S. Constitution, as well as Art. I, Section 18(a) of the Missouri Bill of Rights, for the reasons that counsel's representation amounted to a conflict of interest in that counsel, prior to the plea of guilty, hired the former prosecutor who filed the charges against Movant, and who had made a binding deal with the co-defendant to testify against Movant, and who had made it clear to Movant that he was going to put Movant away forever; such that Movant suffered great and substantial prejudice.

Cause no. 81-0700C(3) (E.D. Mo., filed June 15, 1981).

This case was subsequently consolidated with another habeas action Pool had filed in October 1982. *Pool v. Wyrick,* No. 82-1702C (E.D. Mo., filed October 21, 1982). In that case, Pool incorporated his claims in cause no. 81-0700C and stated generally that "conflict of interest of counsel" was one of the grounds for relief in his present petition.

In March 1985, upon the reported conclusion of relevant state court proceedings and careful consideration of the parties' positions, United States Magistrate David D. Noce filed a thorough and reasoned report and recommendation in the consolidated habeas corpus actions. With respect to the alleged conflict of interest, Magistrate Noce stated:

> Petitioner asserts that he was denied effective assistance of counsel, because prior to the guilty plea, his counsel hired into her public defender's law office the former prosecutor who filed the charges against petitioner and who had made a guilty plea agreement with Stirrat. As set forth above, petitioner's counsel did not discuss his case with former prosecutor Kobaldt after Kobaldt came into Daley's office, nor did prosecutor White discuss Pool's case with Kobaldt. Nowhere in the record does petitioner allege any actual conflict of interests between him and anyone else and the record does not establish that such occurred. Without an actual conflict of interests, petitioner is entitled to no relief from his conviction. *Cuyler v. Sullivan,* 446 U.S. 335, 348, 350 (1980). Petitioner argues that when Kobaldt entered Daley's employment, Daley became an adversary to Pool, *citing Whiteside v. Scurr,* 744 F.2d 1323 (8th

> Cir. 1984). However, that case is entirely inapposite to petitioner's case, because Whiteside's case involved an actual conflict of interests. No actual conflict existed in Pool's case.

Report and Recommendation at 32-33, filed March 21, 1985. The Magistrate recommended that both petitions be denied.

Upon consideration of Pool's objections to the Report and Recommendation, on May 7, 1985, the Court sustained the Magistrate's Report and Recommendation.

On July 7, 1985, the Court received Pool's notice of appeal. On July 8, 1985, petitioner filed an "application for leave to file untimely appeal in this court," and "application for leave to proceed on appeal in forma pauperis, for the issuance of a petition for writ of probable cause." In the latter application, petitioner raised in particular the conflict of interest issue. In the former application, Pool stated:

> The [May 7, 1985,] Order that the petitioner received from this court was either delayedin [sic] the Clerks [sic] Office or held up by the administrative mailroom at MECC. The petitioner did not receive the order until July 1, 1985.
>
> There is no justifiable reason why the order did not get to the petitioner in time for him to file his timely appeal. The records in this case indicate that petitioner has always filed a timely appeal, See: Pool v. Wyrick, 703 F2d 1064 (CA8).

This Court denied those applications on August 26, 1985.

On October 4, 1985, the United States Court of Appeals for the Eighth Circuit denied Pool's motion for leave to take untimely appeal and Pool's application for certificate of probable cause. *Pool v. Wyrick,* Misc. No. 85-8073, order (8th Cir. Oct. 1, 1985).

On October 16, 1985, Pool filed in this Court a "motion to vacate judgement [sic]" and an "application for leave to proceed in forma pauperis on the application under Rule 60(b)." In particular, Pool alleged he did not receive the May 7, 1985, order sustaining the Magistrate's Report and Recommendation until long after the time for appeal had expired. Pool asserted that state correctional officials interfered with his ability to seek a certificate of probable cause and to seek an appeal by allegedly failing to get Pool's legal mail to him. On March 11, 1986, this Court denied those requests.

On April 14, 1986, Pool submitted an "application for leave to appeal as a poor person, for the issuance of a certificate of probable cause." In May 1986, those requests were denied.

In April 1986, the United States Supreme Court denied Pool's petition for writ of certiorari.

Finding that the conflict of interest claim Pool now seeks to assert was previously raised and decided adversely to Pool in earlier habeas corpus actions; and that the alleged interference of state officials with earlier habeas actions may support a civil rights action under 42 U.S.C. § 1983 but would not merit relief under 28 U.S.C. § 2254, *see Katz v. King,* 627 F.2d 568, 577 (1st Cir. 1980) (default on civil claims without trial may not be addressed in habeas corpus proceeding "which is bottomed on a bodily restriction of one's freedom"),

IT IS HEREBY ORDERED that, without further proceedings, petitioner's petition for habeas corpus pursuant to 28 U.S.C. § 2254 be and it is summarily dismissed.

Dated this 31st day of March, 1987.

/s/ William L. Hungate
United States District Judge

(Filed August 22, 1986)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

86-1711-C-3

FRANK POOL,
Plaintiff,

v.

WILLIAM M. ARMONTROUT,
Defendant.

ORDER OF UNITED STATES MAGISTRATE CONCERNING IN FORMA PAUPERIS STATUS

Petitioner having shown an inability to pay the filing fee for the commencement of this action,

IT IS HEREBY ORDERED that the Clerk receive and file the complaint in this matter without the payment of the required filing fee, however, the Clerk shall not issue process upon said complaint, but shall submit the matter to the District Court for a determination of whether process and summons shall issue upon the complaint, since the complaint fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6).

The petitioner shall have twenty (20) days in which to file a written response to the above order.

/s/ Carol E. Jackson
Carol E. Jackson
United States Magistrate

Dated this 22nd day of August, 1986.

Original

SUPREME COURT, U.S.
FILED
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No. 88-1026

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

BILL ARMONTROUT, WARDEN
of the Missouri State Penitentiary,

Petitioner,

vs.

FRANK KEVIN POOL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT

SPRINGFIELD BALDWIN
Attorney appointed for Respondent
Frank Kevin Pool by the United
States Court of Appeals, Eighth
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BEST AVAILABLE COPY

QUESTIONS PRESENTED

I.

Whether in a petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254, a claim of error occurring in prior federal habeas corpus proceedings can serve as a basis for federal habeas corpus relief?

II.

Whether a claim of conspiracy to deny access to the Courts is cognizable in a proceeding for habeas corpus relief under 28 U.S.C. §2254?

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OPINIONS BELOW

See the petition for certiorari, page 1, and the petition's appendix. Later, other references are made to said appendix.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit's order denying both Petitioner's and Respondent's motion for rehearing was issued Sept. 20, 1988 (A1). The Attorneys General of Missouri, acting as attorneys for Bill Armontrout, Warden of the Missouri State Penitentiary, filed a petition for certiorari on the Warden's behalf in this Supreme Court case No. 88-1026. Also, the undersigned attorney, who had been appointed by the United States Court of Appeals for the Eighth Circuit to represent Frank Kevin Pool as his attorney on appeal, filed a petition for certiorari on his behalf in this court in case No. 88-6091 before the Warden's petiton was filed. Both of the petition for certiorari were filed within 90 days of the Court of Appeals' order denying the motions for rehearing in banc. Therefore, the jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS INVOLVED

(part of) AMENDMENT VI, U. S. CONSTITUTION

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of

United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law,nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Court should note that two petitions for certiorari have been filed involving the matters of this case. The one filed by Pool is Supreme Court case No. 88-6091. The one filed by the Missouri Attorneys General on behalf of Warden Armontrout is Supreme Court Case No. 88-1026. Since, this brief is filed in case No. 88-1026, Frank Kevin Pool will be referred to either as Respondent or simply as "Pool".

When Pool was 13 years old he was sent by the St. Louis County, Missouri Juvenile Court to the state mental hospital at Fulton, Missouri. He continued under the supervision of the Juvenile Court and that was his state at the time of the murder in Phelps County. Since, he was under Juvenile Court supervison, he was sent back to said Court. The Phelps County, Missouri Circuit Judge sent Juvenile Judge Ninian Edwards a note that read: "Ninian, we want this boy back".

A Doctor Kessing filed a report in the Juvenile Court stating Pool had a long history of assaultive behavior, and Kissling considered Pool to be "an extremely dangerous individual, and to be in need of confinement and treatment.

The Judge Ninian Edwards found Pool should stand trial as an adult and Pool was returned to Phelps County where he was/was charged with Murder. Apparently, he shot dead a man whom he robbed and who had very little money. This had enraged Pool, as most everything did. While in Phelps County, Pool got into fights with the Sheriff and the jailer. Pool was about sixteen years old.

One Paul Crider was the Phelps County Public defender and he was to represent Pool. He gave the Phelps County Prosecutor, one

Kerry Koboldt, notice that the defense would be not guilty because of mental disease. This meant he would attempt to prove what the Missouri statute required, namely, that Pool was not able to conform his conduct to the requirements of the law at the time of the crime. Crider's motion for a mental examination was granted and Pool was sent to the Missouri mental hospital at Fulton. There he got in more fights and was given the drug thorazine which is recommended to control violent patients. Pool was in maximum security. He was examined by a pyschiatrist, apparently an East-Indian, by the name of Sadashiv Parwatikar, M.D., who offices in St. Louis and apparently drives the 120 miles to Fulton, Mo. to make a few bucks. This doctor has been sued for making a false report by an inmate, but the court dismissed the suit holding him immune. See Moses v. Parwatikar, 813 F.2d 891 (8th Cir.1987).

As for the examination of Pool, Parwatikar reported Pool giggled inappropriately throughout the interview. Pool told the doctor: "I must have been crazy to have my father ~~and tried to stab him~~ tried to stab my father and stab my sister. There is no reason why I do that but our family is rather strange." Dr. Parawatikar would later testify in Pool's post-conviction motion hearing that he did not know for sure whether Pool had been administered thorzine , but the drug would have no effect on the thought processes except to slow them down. (See United States v. Bennett, 460 F.2d 872 (8th Cir. 1972) where the Court held the opposite.) The doctor's report stated Pool believed his attorneys would work against him, and Pool does not seem to be suffering from any mental illness.

Before time came for trial, prosecutor Kerry Koboldt was defeated for election, and Public Defender Crider resigned. The new Public Defender, Terry Daley, then hired the former prosecutor, Koboldt, as an assistant public defender. Since Koboldt had made a deal with Pool companion, Stirrat, to testify against Pool, Koboldt's testimony would have been needed to impeach Stirrat if Stirrat failed to keep the agreement to testify against Pool. This

was
An actual conflict of interest.

Terry Dailey felt that Pool acted normal and so testified at the post-conviction motion hearing under the Missouri Supreme Court's Rule 27.26 proceeding in the trial court. The Public Defender made no effort to interview jailer, friends, doctors, Pool's parents, nor did she make any effort to obtain a separate and independent psychiatric report on Pool. Without effort to further investigate the defense of not guilty by reason of mental disease, the new Public Defender simply pled Pool guilty to the charge of first degree murder, obtaining by plea bargain the reduction of the charge of capital murder which would have been punishable by either death or else by 50 years imprisonment without parole.

In his state post-conviction motion under Missouri's Rule 27.26, Pool would include the attorney's conflict of interest, and allegation of ineffective assistance of counsel under the U. S. Constitution's Sixth Amendment. The post-conviction motion was overruled. As stated, the Missouri Court of Appeals sent the case back so Pool could amend his motion. The case continued pending and after 20 months, the U. S. Court of Appeals for the Eighth Circuit order the District Court to hear a motion by Pool for habeas corpus if the State court did not hear Pool's post-conviction motion in 90 days. (See Pool v. Wyrick, 703 F.2d 1064 [8th Cir.1983].) The state court then heard and overruled Pool's post-conviction motion, and the Missouri Court of Appeals affirmed in Pool v. State, 670 S.W.2d 210 (Mo.App.1984).

In 1981 and 1982 Pool filed petitions in the U. S. District Court for the Eastern District of Missouri, and they were then consolidated. U. S. Magistrate David Noce recommended dismissal and the district court agreed and dismissed Pool's petition. He had alleged claims which included the attorney conflict of interest and the ineffective assistance of counsel claims mentioned above. The dismissal took place May 7, 1985 and it was not until July 7, 1985 (more than 30 days after dismissal) that notice of appeal was

filed. Pool also filed an application for leave to takean untimely appeal and for a certificate of probable cause, all denied by the district court, with the 8th Circuit Court of Appeals affirming.

Pool then filed a motion to vacate the district court's judgment under Federal Rule of Civil Procedure 60(b), alleging prison officials had failed to get his legal mail to him so that he was unaware of the dismissal of his habeas motions. He also sought leave to appeal as a poor person. The court denied leave these motions and the U. S. Supreme Court denied his petitionfor certiorari.

Pool then filed in the instant case, his petition for habeas corpus under Title 28, §2254, alleging in detail how state officials withheld from him the order denying his previous ~~his~~ habeas corpus petition and his Rule 60(b) motion, and to these allegations he attached an affidavit by one Melvin Leroy Tyler, a penitentiary inmate who acts to assist other inmates with their legal problems. Tyler stated he had assisted Pool in his habeas corpus action, that in each of certain other actions Pool had brought timely responses were filed, and that prison officials could have gotten the order denying the habeas to Pool on time but they did not as they had Pool "locked down" and withheld his papers, and Tyler believed that the case of "US EX REL. COOK V. DOWD, 71 S.t. 262, 340 U.S. 206 applied where prison authorities obstructed the ability to file a timely appeal. Pool also realleged the conflict of interest claim. U. S. District Judge William Hungate summarily dismissed Pool's habeas petition, and notice of appeal was timely filed. Judge Hungate granted a certificate of probable cause to appeal and leave to appeal in forma pauperis. The appeal was to the United States Court of Appeals for the Eighth Circuit(herein after referred to as the "8th Circuit").

The Eighth Circuit opinion (See A2-A13) held that Pool's claim that state prison officials interfered with his appeal was a claim that their action had the effect of denying or delaying Pool's release from confinement which is a proper habeas claim (A5). But

the Court also held he was prejudiced by these acts because his other claims had merit and would have been entitled to relief. But if they had no merit there would be no need for an evidentiary hearing to determine whether there was interference by state prison officials.

The Eighth Circuit then held there was no actual conflict of interest (A7), and then after reviewing the record held that Pool's claim of ineffective assistance was a "close one" (A10) but the conduct of Pool's counsel (Public Defender Terry Daley) did not fall below an objective standard of reasonableness, etc. (A11-A12). The 8th Circuit therefore found Pool's claims to be without merit and affirmed the decision of the district court to dismiss Pool's petition for habeas corpus.

As noted above both the Penitentiary Warden, Bill Armontrout, and the prisoner, Frank Kevin Pool, have filed petitions for certiorari in the Supreme Court of the United States. The Warden's case has been docketed as number 88-1026, and Pool's case has been docketed as No.88-6091.

This brief is in answer to the Warden's petition and argues concerning the "Questions Presented" by the Warden's petition. Arguments for "Questions Presented" by Pool are found in his petition.

The undersigned attorney was appointed by the United States Court of Appeals to act as attorney for Frank Kevin Pool on appeal.

ARGUMENT

I

Whether in a petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254, a claim of error occurring in prior federal habeas corpus proceedings can serve as a basis for federal habeas corpus relief.

While the undersigned attorney for Respondent Pool has not found any Supreme Court cases with facts precisely like this case, the above question presented by the Petitioner Warden is so broadly phrased that the only practical answer to the question must be "yes." Otherwise, the violation of a provision of the United States Constitution which had caused grave injustice which is only brought to light by future developments demonstrating the correctness of a prior claim of error could never be corrected. Further, the "law of the case" has never been held to be an "inexorable rule". The proposition that a prior claim of error could never be a basis for relief could result in grave injustice.

Also, Fed. Rule Civil Procedure 60(b) provides the Court may "relieve a party...from a final judgment, order, or proceeding" for various enumerated reasons, including "(6) any other reason justifying relief from the operation of the judgment". It is obvious the purpose of the rule is to grant courts authority to do justice when the theoretical technicality of "finality" might otherwise prevent it. All the enumerated reasons in Rule 60(b) are reasons to grant relief on prior claims, when the judgments relieved from are contrary to such prior claims.

One also notes in Houston v. Lack, 108 S.Ct. 2379 (1988) that rightly or wrongly the Supreme Court fashioned a remedy for a prisoner whose remedy would otherwise have been defeated by the actual filing in Court of a notice of appeal more than 30 days after district court judgment. Such a rule prejudices no one, and removes a possible cause of great bitterness against Courts which

could otherwise violate justice in the names of the shiboleths of "comity" and "finality", although no doubt some lawyers representing states would feel it is far more important that justices of the Supreme Court violate their oath of office and refuse to enforce the constitution than it is to not make state judges mad which has become the present day main meaning of "comity".

One notes that Respondent Pool sought relief under Rule 60(b) because (according to his allegation) the prison officials had him "locked down", didn't give him his mail, and also because when his inmate legal adviser gave the prison offical papers to mail to the Court the official didn't mail them in a timely manner.

Also, Title 28, §2254 does not place any such limitation on the power of federal courts to hear habeas corpus cases, but on contrary, gives broad general power under the enumerated eight paragraphs of §2254(d) to hear and decide cases falling into the eight enumerated categories.

The undersigned attorney, on behalf of prisoner Pool suggests the time has come to do justice to habeas petitioners who are prevented from appealing by the action of prison officials. Otherwise, on into the future, all a state has to do to prevent habeas corpus appeals is to seclude the prisoner and cut off all information until the time for filing notice of appeals is past. Such a likelihood should be prevented by this Court granting certiorari and allowing the remedy of filing another petition for habeas corpus, or setting forth what the proper remedy should be.

ARGUMENT

II

Whether a claim of conspiracy to deny access to the courts is cognizable in a proceeding for habeas corpus relief under 28 U.S.C. §2254?

The undersigned attorney stands in awe of the convuluted reasoning of the Attorney General's reasoning under this Question. By that reasoning, if a citizen who committed no crime was thrown into jail without trial, then was allowed file a notice of appeal but no other papers, then was allowed to file for habeas corpus, but the prison officials substituted a worthless allegation for what really happened and the petition were overruled, and the prison officials then prevented the filing of an appeal, all the unfortunate citizen would rightfully have would be a civil rights suit!!! And the Supreme Court of the United States would be powerless to grant any remedy at all. And, of course, it follows that the Attorney General, or more properly, his assistant, who no doubt drafted the petition for certiorari, would think it awful if the justices of the Supreme Court honored their oath of office and enforced the constitution. One can only assume that such action by the Court would destroy "comity and federalism".

The preposterous answer to the Question Presented, by the writer of the petition of certiorari, should be ignored by the Court, except that the Court should grant certiorari, give an honest and honorable answer to the question which is consistent with the oath of office of the justices, wherein it could approve the method followed by the United States Court of Appeals for the Eighth Circuit. However, it would then consider Frank Kevin Pool's own petition in case, determining what the duties of any attorney are in investigating whether a defendant in a criminal case is in such mental condition that at the time of the crime he was not able to conform his conduct to the requirements of the law, and

also just how much of a conflict the prisoner's lawyer must have before the conflict is sufficient to warrant another trial with representation by a lawyer who has no conflict. These ideas are taken from Pool's petition for certiorari which is Supreme Court file No. 88-6091, questions of wide spread interest. Supreme Court Rule 17.

The Court of Appeals for the Eighth Circuit did well to devise a method based upon the thought of Preiser v.Rodiguez, 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973). Where the 8th Circuit went wrong was in holding Pool's claims without merit. See Pool's petition for certiorari.

CONCLUSION

Respondent Pool, by his undersigned attorney, states that he believes he is entitled to have the Supreme Court issue its writ to the United States Court of Appeals for the Eighth Circuit so that the record may be reviewed, that the Supreme Court should approve a method of procedure applicable to Pool's case whereby prison officials cannot cause writs of habeas corpus to be denied by simply keeping a prisoner in ignorance that a U. S. District Court has denied the writ with the consequence no timely notice of appeal is filed, and Pool believes the issues raised in his own petition for certiorari (Case No.88-6091) have merit and the Court should grant certiorari to review them for all the reasons given above, and for all the reasons given in his own petition.

RESPECTFULLY SUBMITTED UNDER RULE 46,

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CERTIFICATION OF SERVICE

I hereby certify that I, Springfield Baldwin, a member of the bar of the Supreme Court of the United States, did on the 28th day of January, 1989 mail three true copies of a "Respondent's Brief", to William L. Webster, Attorney General of Missouri, John M. Morris III, Assistant Attorney General, and Patrick L. King, Assistant Attorney General of Missouri, the attorneys of record for the Petitioner Warden, Bill Armontrout, and the said three copies were placed in an envelope addressed to the said attorneys at their address of record of P. O. Box 899, Jefferson City, Missouri 65102, and said envelope and copies were mailed to them by pre-paid first class mail by the undersigned by delivering the envelope to an established U. S. Post Office.

Springfield Baldwin

SPRINGFIELD BALDWIN,
attorney for Respondent Frank Kevin Pool, and a member of the bar of the Supreme Court of the United States